NO. 83-812

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE C. WALLACE, in His Official Capacities as Governor of the Stat of Alabama and Ex Officio Member of the State Board of Education, et al.,

Appellants,

V.

ISHMAEL JAFFREE, et al.,

Appellees.

On Appeal From the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, URGING REVERSAL

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INTEREST OF AMICUS CURIAE

The Legal Foundation of America is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in IRS regulations. LFA is located on the campus of the South Texas College of Law in Houston, and it shares certain personnel and activities with the law school. All litigation undertaken by LFA is approved by its Board of Trustees, which is composed of attorneys, academics and businesspeople.

The goals of LFA include the attainment of a better balance between the federal government and the States. In particular, LFA believes that the cumulative weight of judicial intervention in democratic control of public schools has weakened the ability of those schools to carry out their mission, including in some instances the very aspects of their mission that such intervention was designed to enhance. LFA has appeared as amicus curiae to

urge these and related views in this Supreme Court, in the federal courts of appeals, in the federal district courts, and in the courts of the several states. Most recently, LFA appeared in this Court to support the accomodation of religion in *Lynch v. Donnelly*, 52 U.S.L.W. 4317 (U.S. S.Ct. Mar. 5, 1984).

SUMMARY OF ARGUMENT

I.

Accomodation. The minute-of-silence statute, to the extent that it concerns religion, involves the accomodation of religion, not its establishment. In numerous cases, this honorable Supreme Court has emphasized that accomodation of religion is not only permitted, but required by the Constitution. Such cases as *Zorach v. Clauson* and *Lynch v. Donnelly* involved accomodations of religion that were more pervasive than the statute in question here and compel the conclusion that this statute is constitutional.

The decision below invalidated substantial interests in the freedom of speech and free exercise of religion. The argument that these are "impressionable" children cuts both ways; for that reason, they are likely to see non-accomodation as official denial of religion. Although the rights of nonparticipants to remain both inconspicuous and silent are fully protected, the Court below unintentionally gave effect to a kind of "heckler's veto," and the resulting suppression of some students' uses of the minute of silence will indirectly suppress related discussion on moral, ethical and theological issues. This result was particularly inappropriate since the minute of silence lacks the indicia that have been considered in other cases as incursions into the area prohibited by the establishment clause.

II.

The three-part analysis. Lynch v. Donnelly indicates that compliance with the three-part analysis of *Lemon v. Kurtzman* is not required in accomodation cases. In fact, the three-part analysis is misleading and should be re-examined. However, the minute

of silence provision clearly complies with the three-part analysis as that analysis was construed in *Lynch*. The lower court's rejection of the statute, based primarily upon motives of some of those who supported it, was inappropriate and should not be followed.

ARGUMENT AND AUTHORITIES

I. TO THE EXTENT THAT THE MINUTE OF SILENCE PROVISION INVOLVES RELIGION, IT CONCERNS ACCOMODATION OF (OR NON-HOSTILITY TOWARD) RELIGION, RATHER THAN ESTABLISHMENT.

The court of appeals decided the case at bar without the benefit of this Court's decision in *Lynch v. Donnelly*, 52 U.S. L.W. 4317 (U.S. S.Ct. Mar. 5, 1984). Since this amicus curiae participated in *Lynch* and urged the accomodation doctrine that the Court accepted, amicus may be able to assist this Court to develop the accomodation issues here. [1]

A. Accomodation of religion (and not merely "tolerance") is required by the Constitution, while "active or passive" hostility toward it is prohibited.

In *Lynch v. Donnelly, supra*, this Court rejected the "wall of separation" theory of the first amendment. Although useful as a metaphor, said the Court, the "wall" notion "is not a wholly accurate description of the practical aspect of the relationship that in fact exists between church and state." The Court went on to hold that

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1 Amicus would stress that this accomodation reasoning is not the only basis for upholding the statute. The face of the statute is neutral and significantly secular in operation. It recognizes "prayer" as well as non-prayer as potential uses to which students may put the minute of silence but does not favor either over the other.

> [T]he constitution . . . affirmatively mandates accomodation, not merely tolerance, of all religions, and forbids hostility toward any . . . . Anything else would require that "callous indifference" we have said was never intended by the Establishment Clause . . . . Indeed, we have observed, such hostility would bring us into "war with our national tradition as embodied in the First Amendment's guarantee of the free exercise of religion."

Id. at 52 U.S.L.W. at 4318.

In support of this conclusion, the Court cited such decisions as *Zorach v. Clauson*, 343 U.S. 306, 313-15 (1952). In *Zorach*, the Court, speaking through Mr. Justice Douglas, said, "We are a religious people whose institutions presuppose a Supreme Being." *Id.* In *Lynch*, its most recent pronouncement, the Court quoted this language from *Zorach* with approval. 52 U.S.L.W. at 4319. In addition, the *Lynch* Court noted with approval the history of accomodation in the United States. [2]

The decision of the court below is based not on the accomodation doctrine, but on the view that silence to be used at the discretion of the student is prayer outlawed by the series of

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2 In Lynch, the Court also relied upon Marsh v. Chambers, 103 S.Ct. 3330 (1983) (the legislative chaplain case). A superficial consideration of Marsh might reject it as irrelevant to a case involving schoolchildren because legislatures are occupied by adults, but Lynch shows that this treatment of Marsh would be erroneous. The Supreme Court, in Lynch, was confronted with a pubic display aimed primarily at children. Nevertheless, it did not consider Marsh irrelevant; instead, it used Marsh as important authority. The Lynch Court cited Marsh as authority for upholding recognition of the religious in a child-directed context and said: "It would be difficult to identify a more striking example of the accomodation of religious belief intended by the framers" than the prayers at issue in Marsh. Lynch v. Donnelly, 52 U.S.L.W. at 4319.

cases culminating in *Abington School District v. Schempp*, 374 U.S. 203 (1963).[3] But *Lynch v. Donnelly* correctly cites *Schempp* as permitting, indeed requiring, accomodation of our own national belief in a Supreme Being. *Lynch v. Donnelly*, 52 U.S.L.W. at 4319. Furthermore, the justices who concurred in *Schempp* took pains to emphasize that accomodation would be constitutionally mandated for less significant religious initiatives than explicit prayer. The statement of Justice Goldberg is particularly striking:

> [U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution but, it seems to me, are prohibited by it.

Abington School Dist. v. Schempp, supra (separate opinion of Mr. Justice Goldberg). Precisely that which Justice Goldberg feared has happened in this case. *See also Id.* at 281 & n. 57 (separate opinion of Mr. Justice Brennan, implying constitutional acceptability of minute of silence).

There are essentially two reasons why the policy must be one of accomodation, and why the "wall of separation" idea must be rejected. The first is that valuable secular purposes cannot be achieved if one is insistent upon squeezing all religious influence out of our public life. In schools, for example, stu-

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3 Appellants' persuasive call for a reexamination of the basis of Schempp provides another ground for rejecting this reasoning. But even without that reexamination, it is submitted here that the application of Schempp to prohibit the minute of silence was erroneous.

dents reading Golding's *Lord of the Flies* or Conrad's *Heart of Darkness* could not examine the theme of the relationship of man, God and original sin; an astronomy or biology teacher must discourage speculation on the question, "What happened before the 'Big Bang?'"; and most of our widely shared cultural notions regarding marriage, family, reverence for life, or numerous other moral and ethical values, could not be discussed because the discussion would advance religion.

The second and more important reason is that what *Lynch v. Donnelly* called an "absolutist" view would contravene the free exercise clause. If we are indeed to try to root out any religious influence in our public life, we will inevitably exalt the establishment clause at the expense of free exercise. "It is difficult to explore the implications of either of these clauses in complete isolation from each other . . . . [because] the two clauses interact . . . ." W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 1163 (1980). For example, one school's ban upon spontaneous voluntary prayer in unused classrooms was a conscientious effort to avoid establishment, but in *Widmar v. Vincent*, 454 U.S. 263 (1981), this Court found that it was also a violation of the rights of students to free expression through prayer. And in approving a release time provision, the Court in *Zorach v. Clauson*, 343 U.S. at 312, pointed out that an absolutist position would prevent police officers' helping parishoners drive to church, legislative prayers, and Thanksgiving Day proclamations:

> [T]hese and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this honorable Court."

Justice Douglas underestimated the "fastidiousness" of the plaintiffs in this case, whose objection is not to any explicit reference to God. Their fastidiousness extends to a mere sixty seconds of

silence, the use of which is left to individual discretion.

B. The minute of silence should be upheld under the authority of prior cases approving accomodation, particularly Zorach v. Clauson and Lynch v. Donnelly, which have permitted more extensive recognition of the religious.

The minute of silence provision is closely analogous to the release time provision approved in *Zorach v. Clauson*. The Court in *Zorach* said, "*The teacher in other words cooperates in a religious program to the extent of making it possible for her students to participate in it. Whether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act.*" 343 U.S. at 312 (emphasis added).

The minute of silence is less intrusive and more modest than the program approved in *Zorach*. It does not identify or stigmatize students who do not want to participate in religious instruction or worship. It occupies minimal time, provides secular benefits to non-religious as well as religious students, calls upon those who have no use for the time only to be silent, necessitates no rescheduling of instructional subjects, and requires no "make-work" programs for nonparticipating students while the majority is on release time.

The minute of silence provision is also a less significant "acknowledgement of religion" than was approved in *Lynch v. Donnelly* or in cases relied upon in *Lynch*. *Lynch v. Donnelly* concerned the public display of symbols with religious origins at the center of the Christian religion, namely the creche or nativity scene. The "acknowledgement of the religious," *see* 52 U.S.L.W. 4322, inherent in the creche was significantly more expressive than any such "acknowledgement" to be found in the minute of silence.

In *Lynch*, furthermore, the Court compared the public erection of a creche with a variety of government actions, ranging

from expenditure of large sums of money for textbooks to Sunday Closing Laws. [4] The Court's conclusion in *Lynch* was that the publicly erected creche was no more an "endorsement" of religion or of any particular faith than these approved government actions. The minute of silence is similarly no greater an endorsement of religion in general, or of any particular sect, than the more substantial actions in those cases—*Allen, Everson, Tilton, Roemer, Walz, McGowan, Marsh,* and *Zorach*—or in *Lynch* itself.

C. The holding of the lower court fails to honor substantial interests in free exercise and expression.

If some students do choose to engage in prayer, that choice has free exercise clause protection as well as a strong speech dimension. *See Widmar v. Vincent, supra.* In fact, the expression at issue is as closely akin to "pure" speech as is to be found. *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969). In *Tinker*, the Court upheld the use of black armbands in a schoolroom to express ethical and moral positions, over the claim that it would offend others and cause disruption.

1. The right of nonparticipants "not to speak" is protected by their right not to pray themselves, and should not become a

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4 The activities cited in Lynch included "expenditures of large sums of money for textbooks," upheld in Board of Education v. Allen, 392 U.S. 236 (1968); "expenditure of public funds for transportation of students to church-sponsored schools," upheld in Everson v. Board of Education, 330 U.S. 1 (1947); "federal grants for college buildings of church-sponsored institutions . . . combining secular and religious education," upheld in Tilton v. Richardson, 403 U.S. 672 (1971); "non-categorical grants to church-sponsored colleges," upheld in Roemer v. Board of Public Works, 426 U.S. 736 (1976); "tax exemptions for church properties," upheld in Walz v. Comm'r, 397 U.S. 664 (1971); "Sunday Closing Laws," upheld in McGowan v. Maryland, 366 U.S. 420 (1961); "legislative prayers," upheld in Marsh v. Chambers, supra; and "the release time program for religious training" upheld in Zorach, supra.

"heckler's veto." The dispositions of other "right not to speak" cases should control here. In *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court held that a driver was protected in refusing to display the New Hampshire state motto on his automobile license. In *West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624 (1943), the religiously motivated refusal of a Jehova's Witness child to salute the flag was held protected. But Plaintiffs in this case are not satisfied with the right not to speak; what they seek is to require that the activity be forbidden, even though that result goes far beyond the result in *Wooley* and *Barnette*. In *Wooley*, this Court did not prohibit New Hampshire from putting its motto on the license plates of consenting motorists. In *Barnette*, the Court did not prohibit public school children from saluting the flag if they were willing to. Neither should the Court prohibit the uses that children may privately make of the minute of silence here.

The "right to remain silent" is precisely the right that is accorded those who do not choose to participate in any speech or expression component of the minute of silence. Such individuals should not be able to go beyond nonparticipation and effect a censorship of uses made of the minute by other individuals by a kind of "heckler's veto."[5]

2. *The argument that "impressionable schoolchildren" are involved is not a reason for engaging in censorship of the minute*

5 In another "minute of silence" case, May v. Cooperman, No. 83-89 (D.N.J., Oct. 4, 1983), the district court based a controlling fact finding on the testimony of a school student to the effect that tolerating other students' use of the minute of silence (by being silent himself) was "stupid and boring." This rationale lifts the "heckler's veto" into another dimension altogether, and would sanction students' efforts to remove reading, writing and arithmetic from the curriculum, since many students consider them stupid or boring. More to the point, Lynch v. Donnelly, supra, disapproves the "curious" notion that "divisiveness" generated by the litigants themselves can be "exploited" as evidence of establishment of religion. 52 U.S.L.W. at 4321.

of silence, because that very "impressionability" makes the official denial of speech and free exercise more serious and detrimental.[6] "Impressionability" cuts both ways. The censorship of thought inherent in prohibition of the minute of silence could easily be perceived by children as official denial of religion. An adult might understand that the government is engaged in an effort at neutrality, however misguided he may personally perceive the policy of censorship. But the very naivete, or "impressionability," of the child negates this sophistication and causes the child to see the refusal to accomodate as official disapproval of religion.

This conclusion is reinforced by the practice of totalitarian governments. In Poland, for example, the government recently made strenuous efforts to root out all religious symbolism from public schools for the ostensible purpose of recognizing "separation of church and state." Opponents of this policy correctly viewed it as a "repudiation" of religion, an affront to personal freedom, and an effort to replace religious belief with the officially approved belief in the communist State itself. Lech Walesa labelled the policy as all the more serious because it took effect in public schools, "where the young generation is being raised."[7]

3. *The lower court's decision denies students the free exercise of religion by allowing them to pray only while pretending to be doing some other, officially sanctioned, classroom behavior.* Some religious people believe that profession of religion is insufficient unless it accompanies and affects one's most impor-

6 The argument that impressionable schoolchildren are involved has been invoked as a distinction in some cases. E.g., Vincent v. Widmar, supra; Abington School Dist. v. Schempp, supra. That argument is invalid in the case of the minute of silence if indeed it is valid in any context.

7 See Classes Boycotted at School in Poland Over Crucifix Ban, Houston Chronicle, April 2, 1984, sec. 1, at 6, col. 1; Church, Government Settle Poland's "War of Crosses," Houston Chronicle, April 6, 1984, sec. 1, at 1, col. 1.

tant daily activities. For such students, the absolute divorcement of all religious expression from the activity at which they are required by state compulsion to spend the majority of their waking hours is nothing less than a denial by the State of the free exercise of religion.

In answer to this concern, it has been said that nonrecognition of a moment of silence will not prohibit silent student prayer; a variant of this view is the cynical aphorism that as long as there are examinations, students will pray in school. Taken literally, this argument reduces to the position that children may engage in the free exercise of religion as long as they are pretending to do something else. This position would interfere with the concentration necessary for free exercise and would force students to dissemble. The minute of silence is a minimum recognition of such students' important and constitutionally protected interest.

4. The discouragement of other kinds of speech on moral and ethical issues will be a side effect of the suppression of the thought at issue here. One of the most insidious aspects of a decision such as that of the court of appeals below is that honorable public employees will try to comply not only with its letter but with its spirit. The inevitable effect is described in this passage written by a teacher:

> [T]eachers now feel inhibited from even thinking and talking and wondering aloud about religious concerns and Biblical ideas and God in the classroom. We must act as if such discussion is absolutely—and defiantly—none of our business.
>
> It is not a moment of silence, then, that concerns us most. It is . . . an attitude that restricts and endangers truly free inquiry and open discussion . . . .
>
> . . . High-school classes discussing "The Scarlet Letter" or "Lord of the Flies," the poetry of Donne or Eliot, the role of religion in the Renaissance and the Reformation or the discoveries of Galileo and Darwin will almost automatically explore the issue of an individual or a society's belief in God and sin or . . . evil . . . . Any teacher worth his salt will make the most of such moments. . . .
>
> Nevertheless, these moments seem few and far between. I think I speak for many teachers when I confess that something—be it the state or society or our own fears, our own embarrassment about discussing religion in front of our classes and the embarrassment, too, of our students—interferes with the freedom to reflect on and wonder about . . . astronomy and our place in the universe or biology and our place in the animal kingdom; . . . 20th-century despair, the loss of faith, and totalitarianism—or the Holocaust and the problem of evil . . . .
>
> . . . [W]e are not simply hiding our faith under a bushel but we are denying our intellect as well . . . . [T]o really think an idea through often leads to that complex, provocative and, unfortunately, in our public schools, apparently suspect and dangerous dimension—to issues of "ultimate concern."

Huidekoper, *God and Man in the Classroom*, Newsweek, April 2, 1984, at 17. Amicus curiae recognizes (as does the author of the passage above) that this Court has ostensibly refrained from prohibiting instruction on ethical, moral and theological issues. But the point is that decisions of courts often have wider effects than are intended, and this is particularly so when they suppress thought and expression—as does the decision below banning the minute of silence.

Opponents of the minute of silence often say that they find it inoffensive in itself, but they wish to suppress it in order to draw a line, preserve a wall of separation, or prevent the establishment of a beachhead from which an invasion of public schools by religion could be launched. Such reasoning is counterproductive. What is being suppressed is real thought, real expres-

sion, and real free exercise of religion, and the suppression is itself a prelude to other self-censorship. In the process, ironically, the American Civil Liberties Union has quite inadvertently adopted the attitude of a censor, and it has been much more effective at the task than those its literature regularly decries.

D. The minute of silence provision does not contain the features that have caused other actions to violate the establishment clause.

1. The minute of silence is not a "purely" religious admonition, does not discriminate, does not give temporal power to church hierarchies, and does not require a captive audience to participate in a religious ceremony. The minute of silence is not "purely . . . a religious admonition." Hence *Stone v. Graham*, 449 U.S. 39 (1980) (the "Ten Commandments" case), is not controlling; the Supreme Court in *Lynch v. Donnelly* distinguished *Stone* on this ground. 52 U.S.L.W. at 4320. Nor is the minute of silence designed to discriminate against minority religions.[8] *Larson v. Valente*, 456 U.S. 228 (1982), which involved a discriminatory licensing provision, is thus inapposite. *See Lynch v. Donnelly*, 52 U.S.L.W. at 4320.

Furthermore, the minute of silence does not give authority

8 The mere fact that an action might be more congruent with the tenents of one faith than another is not a reason for striking the action down. Plaintiffs may claim that the minute of silence is unconstitutional because it is more easily useful to some sectarian groups than others for prayer, or they may point out that some religions prescribe audible prayer, or prayer in certain physical positions, or prayers longer than one minute; but the answer to this contention is that Lynch clearly shows that it is beside the point. In Lynch, the Court said, "Of course the creche is identified with one religious faith . . . .", but the Court characterized the benefit to religion as "'indirect,' 'remote,' or 'incidental'" and pointed out that "its 'reason or effect merely happens to coincide or harmonize with the tenents of some . . . religions.'" Id. at 4321 (emphasis added; citing cases).

to any church hierarchy over temporal matters, and thus such cases as *Larkin v. Grendel's Den*, 459 U.S. (1983), which involved the giving of control over liquor licensing to churches, are not on point. *Lynch v. Donnelly* emphasizes that such absence of authority in religious spokespersons is an important factor. *See* 52 U.S.L.W. at 4321, 4322.

Finally, the minute of silence does not require a captive audience to participate in a religious ceremony. Thus *Schempp v. Abington School Dist., supra*, is inapposite to this issue, even if correctly decided. All that a nonparticipating student must do is remain silent. The act is ambiguous; it may constitute participation in prayer, or it may reflect the student's thinking about the day's activities or similarly secular thoughts, or it may simply be engaged in because it is required, so that other students may have silence for their own contemplation. Students are not singled out or otherwise compelled to pray and may put the time to wholly secular uses.

2. The apprehension of possible abuse should not obscure the unlikelihood of abuse or the ease with which it can be prevented or terminated. The concern that teachers might coerce children to engage in religious uses of the minute of silence underlies some objections to the minute of silence. Such coercion would indeed be cause for concern if it were to occur. However, the very nature of silence would make attempts to engage in coercion both obvious and glaringly inappropriate. There is a far greater possibility of undetectable abuse in substantive instruction. Yet as Mr. Justice Brennan said, "If it should sometime hereafter be shown that in fact religion can play no part in [such instruction] without resurrecting [compulsion], it will then be time enough to consider [the issue]." *Schempp, supra*, 374 U.S. at 1613. *Cf. Tilton v. Richardson*, 403 U.S. 672 (1971) (construction grants for sectarian colleges upheld because of evidence that theology courses required of all students "made no attempt to indoctrinate," and "[i]nspection as to use [of the grant] is a minimal intrusion").

There may be some students who are so offended at the mere fact that other students might voluntarily engage in reli-

gious activity that they want to stop or censor the students they suspect are praying. But all these students are called upon to do during the minute of silence is to refrain from actively interfering with the participating students' contemplation. These students' desire to refrain from silence, so that others cannot have it, is not a cognizable legal interest.

II. THE MINUTE OF SILENCE PROVISION SHOULD NOT BE INVALIDATED UNDER THE THREE-PRONGED ANALYSIS OF LEMON V. KURTZMAN.

A. The three-part analysis fails to recognize free exercise and should be re-examined.

An analysis that is consistent with correct results in clear cases, but that provides no guidance in difficult ones, is not useful. In fact, it may be misleading. Such is the case with the three-part analysis set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The difficulty with the three-part analysis is that it fails to protect accomodation of religion or even to recognize it as a countervailing consideration, and it would obliterate the free exercise clause if consistently applied.

For this reason, amicus urges the Court to re-examine the *Lemon* analysis. "The Establishment Clause should forbid only government action which is *solely* religious and that is likely to impair religious freedom by coercing, compromising or influencing religious beliefs." Choper, *The Religious Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 686 (1980) (emphasis added). Furthermore, an establishment clause violation should be found only if enhancement of free exercise is clearly outweighed by such dangers. Such an analysis would be consistent with the thrust of prior cases, and it would accomodate both halves of the first amendment.

B. Lynch v. Donnelly compels the holding that the minute of silence complies with the three-part analysis if that analysis is applicable.

Even if the three-part analysis should be applied here, the minute of silence should be upheld. The secular purposes attributable to the minute of silence include the providing of a period of transition from the concerns of the non-school day to those of schoolwork. As this Court said in *Lynch*, "The [Christmas] display is sponsored by the City to celebrate the holiday and to depict the origins of that holiday. These are legitimate secular purposes." 52 U.S.L.W. at 4320. If the use of the creche as a symbol to mark the Christmas season is a sufficiently secular purpose, the use of a neutral minute of silence to mark the end of non-school and the commencement of school is similarly sufficient. The minute of silence is also supported by other significant secular purposes.[9] *See, e.g.*, H. BENSON, THE RELAXATION RESPONSE (1975).

The analysis of the "primary effect" and "entanglement" prongs in *Lynch* similarly supports the minute of silence. *Lynch*

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9 Relaxation is likely to be produced by silence and contemplation. Clearing of the mind as well as reduction of nervous energy is likely to result. The teaching of quiet contemplation as a means of relaxation is itself a permissible secular purpose. And the solemnity of purpose that is likewise the probable result is a proper goal.

For a dramatic illustration of secular use of the minute of silence idea, set forth in a popularly published book, see H. BENSON, THE RELAXATION RESPONSE (1975). Dr. Benson conceived the basis of his book while working in a research group at Harvard's Thorndike Memorial Laboratory and in continuing studies at Boston's Beth Israel Hospital. "The following set of instructions," Benson writes, "[may be] used to elicit the Relaxation Response . . . . (1) Sit quietly in a comfortable position. (2) Close your eyes. (3) Deeply relax . . . . (4) . . . Become aware of your breathing . . . . (6) Do not worry about whether you are successful in achieving a deep level of relaxation." Id. at 114-15. Dr. Benson associates a wide variety of medical advantages with the Relaxation response, including reduction of arteriosclerosis, hypertension, cardiovascular disease, stroke, and stress-related psychiatric disorders. Id. ch. 1-4. These are clearly secular purposes, and the State of Alabama was as justified in establishing habits in children that would achieve them as it was in teaching any other subject useful to its pupils.

analyzed the primary effect prong principally by comparing the creche display there at issue with other governmental intervention, ranging from direct financial aid favoring sectarian endeavors to Sunday Closing laws, and found that the display was not "more beneficial to" or "more an endorsement of religion than" those laws. *Id.* at 4321. That conclusion is at least as true of the minute of silence as it is of a display including a creche. [10]

C. The fact that some of those who supported the passage of the minute of silence provision may have personally been religiously inclined is irrelevant to its validity under the three-part test.

The court below emphasized the legislative history of the enactment here, concluding that many of its supporters were personally religious, some would prefer to have prayer in the schools, and some supported the law precisely because it accomodated religion. In *Lynch v. Donnelly, supra*, the dissenting justices pointed out that the motive of the City's officials for retaining the creche was largely religious. The testimony showed that some officials were concerned with the objective of "keep-[ing] Christ in Christmas." The majority of the Court, however, considered this motive irrelevant to the constitutionality of the display, and a similar approach should be adopted here.

"References to the motives of members of the legislature

10 With respect to entanglement, the court pointed out that there is "nothing here, of course, like the 'comprehensive, discriminating, and continuing state surveillance' or the 'enduring entanglement' present in Lemon," even though the creche would be erected annually in the context of a display and activities that might vary from year to year. Id. at 4321. Silence is a type of conduct required of all students in many contexts throughout the school day, and it can easily be neutrally administered. There is certainly less danger of its misuse than there is of (for example) scholarly examination of the Bible, literary study of religion-influenced works, art classes, biology classes, or inquiry into comparative religion. See Part I(D)(2) of this brief.

in enacting a law are uniformly disregarded . . . . Not only may the reasons which prompted the various members to enact the law be varied and conflicting and difficult to determine, but they may be unrelated to any consideration having to do with the meaning of the statute." [11] C. SAND, 2A SUTHERLAND STATUTORY CONSTRUCTION 223-24 (1972 & Supp. 1983). The democratic nature of legislatures would otherwise ensure enough diversity of motive to strike down much otherwise valid legislation. [12]

CONCLUSION

The judgment of the lower court with respect to the minute of silence should be reversed. Accomodation of religion is not

11 Furthermore, the fact that a proposition is favored by some persons because it is congruent with teachings of their religions cannot be a reason for invalidating legislation. Current laws regarding family and marriage have religious roots. The history of our language contains periods during which the primary motive for development was the glorification of the deity. Even some of our scientific knowledge was generated by people whose motive was religious; Blaise Pascal, for example, whose work was instrumental in developing the calculus, illustrated the concept of mathematical expectancy by a religious example. Since the value of heaven is infinite, Pascal reasoned, any probability of its existence created an infinite mathematical expectancy, and he used this logic, known as "Pascal's bet," to illustrate the consistency of science with religion.

12 The lower court's reasoning would also unintentionally lead to invidious discrimination. For example, the lawfulness of local government cooperation with an individual benefactor to set up a charitable hospital would depend upon a kind of religion-based litmus test of that individual's private beliefs. If he expressed his reasons in terms of a humanitarian impulse to aid in healing indigents, the lower court would approve. But if he undertook precisely the same action while saying that he subjectively intended to glorify God through contributions to the healing art, the lower court would prohibit the hospital as unconstitutional. Such an approach would result not only in the disenfranchisement of all religious people, but also in the deprivation to society of the benefit of their accomplishments.

prohibited by the establishment clause, and indeed it is affirmatively encouraged by the Constitution. Although some students will use the minute of silence for personal religious purposes, that is nothing more nor less than the free exercise of religion. Nonparticipating students have the right not to engage in any religious exercise, but this statute affords them that right. The decision in *Lynch v. Donnelly, supra*, is strong authority for upholding this law.

Respectfully submitted,

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